



SO ORDERED.

SIGNED this 23 day of January, 2006.

**THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.**

A handwritten signature in black ink, appearing to read "R. Stair Jr.", written over a horizontal line.

**Richard Stair Jr.
UNITED STATES BANKRUPTCY JUDGE**

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 05-38247

MARCEY D. MOORE

Debtor

MEMORANDUM AND ORDER

The Chapter 13 Trustee, by her Motion to Dismiss filed on January 17, 2006, has raised the issue of the Debtor's eligibility to file for bankruptcy relief pursuant to 11 U.S.C. § 109(h) (2005). This section of the Bankruptcy Code requires an individual to receive a briefing from an approved nonprofit budget and credit counseling agency within the 180 days immediately preceding the date upon which a bankruptcy petition is filed.

The Debtor filed the Voluntary Petition commencing this Chapter 13 bankruptcy case on November 16, 2005. She did not file a certification that she had obtained pre-petition consumer credit counseling as required under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), applying to all bankruptcy cases filed on or after October 17, 2005. However,

she did file a document entitled “Certificate Pursuant to 11 U.S.C. 109(h)(3)(A),” which states the following:

Comes now the Debtor and certifies that exigent circumstances exist as to prevent completion of pre-petition credit counseling in that her principal residence is scheduled for foreclosure on November 17, 2005. This case is being filed on November 16, 2005, to pay off mortgage arrearages and Debtor requests extension of time to comply with the credit counseling and provide certification.

On December 15, 2005, the Debtor filed the Debtor’s Certification of Completion of Instructional Course Concerning Personal Financial Management, along with a Certificate from Consumer Credit HH, stating that the Debtor received counseling on December 14, 2005.

One new requirement instituted by virtue of BAPCPA is the necessity of individual debtors to attend a consumer credit counseling briefing prior to filing a petition under any chapter of the Bankruptcy Code. Section 109(h), entitled “Who may be a debtor,” provides, in material part:

(h)(1) Subject to paragraphs (2) [inapplicable] and (3), and notwithstanding any other provision of this section, an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

....

(3)(A) Subject to paragraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that—

(i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1);

(ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 5-day period beginning on the date on which the debtor made that request; and

(iii) is satisfactory to the court.

(B) With respect to a debtor, an exemption under subparagraph (A) shall cease to apply to that debtor on the date on which the debtor meets the requirements of paragraph (1), but in no case may the exemption apply to that debtor after the date that is 30 days after the debtor files a petition, except that the court, for cause, may order an additional 15 days.

11 U.S.C.A. § 109(h).

Proof that a debtor received this counseling must be filed at the commencement of the case by filing the following documentation:

(1) a certificate from the approved nonprofit budget and credit counseling agency that provided the debtor services under section 109(h) describing the services provided to the debtor; and

(2) a copy of the debt repayment plan, if any, developed under section 109(h) through the approved nonprofit budget and credit counseling agency referred to in paragraph (1).

11 U.S.C. § 521(b) (2005); *see also* INTERIM FED. R. BANKR. P. 1007 (“[A]n individual debtor must file the certificate and debt repayment plan, if any, required by §521(b), a certification under §109(h)(3), or a request for a determination by the court under §109(h)(4).”).

The court recently examined this precise issue and found that the statute unambiguously required compliance as follows:

[A]ny consumer debtor filing a petition under any chapter of the Bankruptcy Code must either (1) participate in consumer credit counseling prior to filing, or (2) certify to the court that they were unable to meet this requirement prior to filing due to exigent circumstances, with a thirty-day grace period. Any individual consumer debtor that has not met this requirement may not be a debtor under any chapter of the Bankruptcy Code after October 17, 2005.

In re Fields, No. 05-37959, 2005 Bankr. LEXIS 2634, at *13-14 (Bankr. E.D. Tenn. Dec. 9, 2005) (footnote omitted).

The statute expressly sets forth that there is only one way in which a waiver of the pre-petition counseling requirement due to exigent circumstances can be obtained. That way is summarized as follows:

Section 109(h)(3) states that any debtor requesting a waiver must file a certification with the court, providing the following necessary elements, which satisfy the court: (1) a description of the exigent circumstances meriting the waiver; and (2) a statement that the debtor actually requested consumer credit counseling with an approved agency, but he or she was unable to obtain the counseling because the agency was unable to provide the debtor with counseling within five days of the debtor's request. Nevertheless, even if the court does find that exigent circumstances prevented the debtor's pre-petition counseling, and a waiver is granted, the debtor must still complete consumer credit counseling post-petition and file certification thereof within thirty days of the date upon which the bankruptcy case was filed.

Fields, No. 05-37959, 2005 Bankr. LEXIS 2634, at *15-16 (footnote omitted); *see also In re Cleaver*, 333 B.R. 430, 434 (Bankr. S.D. Ohio 2005) (“The three requirements for an acceptable certification under § 109(h)(3)(A) are couched in conjunctive language and, therefore, all three must be satisfied for the certification to be effective as a temporary exemption from the pre-petition briefing mandated by § 109(h)(1).”).

The language of the statute is clear, as is the court's opinion in *Fields*. A debtor must present to the court exigent circumstances to warrant a waiver of pre-petition consumer credit counseling, as well as attempt to obtain the counseling pre-petition but be unable to do so within five days from the initial request, in order to receive a waiver of the pre-petition counseling requirement under § 109(h)(3)(A). Subsection (h)(3)(B), concerning the 30-day grace period, does not apply unless

subsection (h)(3)(A) is satisfied. The court has no discretion and simply cannot otherwise grant an extension for the Debtor to obtain the required counseling post-petition.

Here, the Debtor filed her bankruptcy case on November 16, 2005, but she did not obtain counseling until December 14, 2005. Without determining whether a foreclosure the following day constitutes exigent circumstances as contemplated by the statute, the fact remains that the Debtor's "Certificate Pursuant to 11 U.S.C. 109(h)(3)(A)" does not contain the certification required by §109(h)(3)(A)(ii) that, prior to filing her case, she requested credit counseling but was unable to obtain the services within a five day period. Accordingly, the Debtor is not eligible to be a debtor under any chapter of title 11, and her case must be dismissed. The court has no discretion under BAPCPA – the Debtor was required to at least attempt to fulfill the consumer credit counseling requirement prior to filing her bankruptcy case. *See Cleaver*, 333 B.R. at 433 ("The statute is unequivocal and allows for no other excuse or exception."); *In re Wallert*, 332 B.R. 884, 890 (Bankr. D. Minn. 2005) ("The application of § 109(h), as thus read, falls heavily on one subset of debtors—particularly at present, in the early stages of a transition to a new bankruptcy law regime. Nonetheless, because the requirements of the statute are so clear and so exacting on their face, and because they dovetail with a rational divination of congressional intent, it simply is not open to the courts to depart from their express terms."). The fact that the Debtor obtained credit counseling within thirty days post-petition is of no significance since § 109(h)(3)(A) was not satisfied.

For the reasons set forth above, the court directs that because the Debtor did not attempt to obtain a consumer credit counseling briefing from an approved nonprofit budget and credit counseling agency prior to filing her bankruptcy petition, as required by 11 U.S.C. §109(h), she is

not eligible to be a debtor under any chapter of title 11. This bankruptcy case is accordingly
DISMISSED.

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